Supreme Court, U.S.
FILED

982047 JUN 2 1 1999

OFFICE OF THE CLERK

Supreme Court Docket Number .....

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

In re the Custody of Charles Patrick Dittler, a minor child.

EUGENE P. DITTLER,

Petitioner,

v.

PHILIP ROBEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF WASHINGTON

State Trial Court No. 95-5-03936-8

Appellate Cause No. 40658-2-I

Eugene P. Dittler, Appellant *pro se*

1500 NE 15th Avenue, #440

Portland, OR 97232

Telephone: 503-460-1914

27pp

QUESTIONS PRESENTED FOR REVIEW

1. Does a person found by the court to have "psychological parent" status have substantive rights sufficient to overcome a fit parent's rights, privileges and liberties guaranteed by §1 of the Fourteenth Amendment?

2. Is a person's active duty in the United States military a legal disability in determining custody of his or her child?

3. How well-defined must "harm" be in a state statute which is relied upon to award custody of a child to a non-parent against a fit parent?

PARTIES TO THE PROCEEDING

Eugene Dittler, Appellant *pro se*

1500 NE 15th Avenue, #440

Portland, OR 97232

Telephone: 503-460-1914

Philip Robey, Respondent

Represented on appeal by:

Catherine W. Smith, Edwards, Sieh, Smith & Goodfriend

701 5th Ave, Ste. 7170

Seattle, WA 98104

Telephone: 206-624-0974

Lorie Rust, Mother

5337 Village Park Drive SE #2343

Bellevue WA 98006

Telephone: 425-562-7178

TABLE OF CONTENTS

CITATIONS OF THE UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY WASHINGTON COURTS . -5-

BASIS FOR JURISDICTION IN THIS COURT . . . . . -6-

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE . . . . . -7-

STATEMENT OF THE CASE . . . . . -8-

ARGUMENT . . . . . -11-
RELEVANT POINTS AND PARALLELS WITH STANLEY . . . . . -14-
RELEVANT PARALLELS WITH SMITH . . . . . -17-
RELEVANT PARALLELS WITH MICHAEL H. . . . . -18-
THE "POWERFUL COUNTERVAILING INTEREST" STANDARD . . . . . -20-
DEFERENCE DUE VETERANS . . . . . -21-
CONCLUSION . . . . . -21-

APPENDIX . . . . . -23-

TABLE OF CITED AUTHORITIES

Constitutional and Federal Authorities

Fourteenth Amendment to the U.S. Constitution, §1 . . . . . -7-, -10-

Meister v. Moore, 96 U.S. 76 (1877) . . . . . -13-

Michael H. v. Gerald D., 491 U.S. 110 (1989) . . . . . -13-, -18-, -19-

Smith v. O.F.F.E.R., 431 U.S. 816 (1977) . . . . . -13-, -17-

Soldiers' and Sailors' Civil Relief Act . . . . . -12-, -16-, -21-

Stanley v. Illinois, 405 U.S. 645 (1972) ..... -13--17-, -20-

RCW 26.10 ..... -7-, -20-

RCW 26.10.030 ..... -7-

RCW 26.10.100 ..... -8-

RCW 26.10.190 ..... -8-

U.S. Supreme Court Rules

Rule 10(c) ..... -11-

Rule 29.2 ..... -6-

CITATIONS OF THE UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY WASHINGTON COURTS

Final Order of the Superior Court

In re the Custody of Charles Dittler, unpublished opinion by the Washington State Court of Appeals, Division I, on January 25, 1999, case number 40658-2-I.

Order denying review by the Washington State Supreme Court, dated March 22, 1999.

BASIS FOR JURISDICTION IN THIS COURT

The Washington State Supreme Court denied review of the Court of Appeals' January decision on March 22, 1999. No rehearing was applied for or scheduled.

The state courts therefore foreclosed their decision on the two important federal questions presented in this Petition in a way that conflicts with the relevant decisions of this Court cited in this Petition.

I am not aware of any *statutory* provisions conferring on this Court jurisdiction to review the order and judgment in question.

This Petition is timely before this Court. The decision by the Washington State court of last resort, the state Supreme Court, is dated March 22, 1999. There is no entry date for that order, which is in letter form. The ninetieth day from March 22, 1999, is Sunday, June 20, 1999. Pursuant to Supreme Court Rule 29.2, so long as this Petition bears a first class mail postmark of June 21, 1999, and is addressed to this Court, it is timely filed.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES,

AND REGULATIONS INVOLVED IN THE CASE

Fourteenth Amendment to the U.S. Constitution, §1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington, Title 26, Chapter 10 (hereafter RCW 26.10). Specifically:

RCW 26.10.030 (Child custody proceeding — Commencement — Notice — Intervention):

> "(1) Except as authorized for proceedings brought under chapter 26.50 RCW in district or municipal courts, a child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.
>
> "(2) Notice of a child custody proceeding shall be given to the child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties."

RCW 26.10.100 (Determination of custody — Child's best interests):

> "The court shall determine custody in accordance with the best interests of the child."

RCW 26.10.190 (Child custody decree — Modification):

> "(1) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the custodian and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the custodian established by the prior decree unless: (a) The custodian agrees to the modification; (b) The child has been integrated into the family of the petitioner with the consent of the custodian; or (c) The child's present environment is detrimental to his or her physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.
>
> "(2) If the court finds that a motion to modify a prior custody decree has been brought in bad faith, the court shall assess the attorney's fees and court costs of the custodian against the petitioner."

STATEMENT OF THE CASE

In 1995 Respondent filed a Non-Parental Custody action under RCW 26.10 seeking custody of Charles Patrick Dittler, a minor who was not his child. Mother settled with Respondent but Father contested Mr. Robey's action. The matter was tried in the Superior

Court for King County in March 1997. The trial court granted Respondent custody, care and control of child. That decision was timely appealed to the Washington State Court of Appeals, Division I. An unpublished decision was returned on January 25, 1999, affirming the trial court's judgment. Father petitioned the Washington Supreme Court for review. Review was denied on March 22, 1999. The facts most relevant to this argument are this Petition are:

- Charles Patrick Dittler was born October 13, 1990. At that time Father was in the U.S. Air Force stationed at McChord AFB near Tacoma, Washington.
- Father, Mother and child lived together as a family until Father's tour of duty began in February, 1991.
- Father and mother were and remain unwed.
- Child's paternity has never been disputed. However, it was formally endorsed by a 1993 stipulated court order.
- Mother was deemed unfit by the trial court. She has not participated in the appellate process.
- Father was discharged from the U.S.A.F. in 1996.

- Father has not been found to be an unfit parent by any state court.
- Respondent is neither the biological nor adoptive parent of Child.
- Mother and Respondent had a relationship which produced a daughter who lives in the same household as Respondent and Child.
- This legal controversy for Charles' custody, care and control is not between Father and Mother. It is between Father and Respondent, a non-parent who has essentially claimed "squatter's rights"[1] to Father's only child.
- Father devoted ten years of his life to the U.S. Air Force, including a tour of duty which lasted from February 1991 until discharge in 1996. Duty stations included the Philippines, Korea, Virginia, Panama City, Italy, Honduras, Florida, and Virginia.. Father supported Child financially and maintained as much of a personal relationship with Child as

---

[1] Borrowed from Justice Stewart's concurring opinion in Smith v. O.F.F.E.R., 431 U.S. 816, 857 (1977).

much as could be maintained under the circumstances of his military service.

- Mother voluntarily turned Child over to Respondent without Father's permission or involvement, and without first offering Father custody of Child.
- Although the trial and appellate courts could not find Father unfit, it was "determined that the best interests of the child would be served by placement with the nonparent because the child's growth and development would be detrimentally affected by placement with his biological father." Appendix at **. This was based largely on the opinions of the guardian ad litems and a psychologist.

ARGUMENT

The chief reason relied on to allow the writ is found in Rule 10(c): a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. These important federal questions would be those presented on the "Questions Presented for Review" page above.

Not mentioned by the Rules but relevant is this case may actually be one of first impression to you: the legal disability in a parent versus non-parent child custody case created by a parent's service in the U.S. military. Does this violate federal law including but not limited to the Soldiers' and Sailors' Civil Relief Act?

The crux of this case lies squarely on two hot issues: first, an unmarried father who serves his country in a capacity that takes him out of his child's vicinity for extended periods of time is apparently expected to forfeit his claim to custody, care and control of his child to a "psychological parent"; second, such intrusion into sacred familial privacy is legal under the state-endorsed guise of "child's best interests."

This case provides you with the opportunity to determine the rights asserted by a new class of child custody claimants arising in state family courts — non-parents with whom mental health and other "experts" have sided to create a class of pseudo-parents called "psychological parents."

This court has a long tradition of dealing with disputes between family members asserting their rights and state intrusion

beginning with Meister v. Moore, 96 U.S. 76 (1877) (unless a state statute actually confers rights, it is directory *only*, not mandatory). The relevant authorities could easily fill a small library or the citations this page. That should be unnecessary here. You will find them interspersed within your relevant decisions cited below.

The strongest parallels between this case and your past decisions are found in Stanley v. Illinois, 405 U.S. 645 (1972) (Illinois statute presumed unwed fathers unfit), Smith v. O.F.F.E.R., 431 U.S. 816 (1977) (non-parents are *not* protected by relevant guarantees available to parents by the federal Constitution; also your sole case to date mentioning "psychological parent"), and Michael H. v. Gerald D., 491 U.S. 110 (1989) ("California law, like nature itself, makes no provision for dual fatherhood.").

The relevant parallels with Stanley are uncanny. First, however, I distinguish this case from Stanley in that I have legitimized my child, I have not lived with my child for his entire life, nor has the state on its own removed him from his home based on an automatic presumption of unfitness.

RELEVANT POINTS AND PARALLELS WITH STANLEY

First, Illinois law presumed unmarried fathers were unfit. Stanley at 649-658. There is a working presumption of unfitness here also, though it is too subtle to be a statute. It is the presumption that unless I have lived in the same household with my child for a set period of time or percentage of his life I am unfit to assert my unalienable parental right to retrieve him from a non-parent, bring him home and enjoy his daily companionship and love, and pursue the relationship we have longed for but prevented from having due to my military service. And to which, according to the Constitution and your past decisions, we are entitled.

Second, Peter Stanley's children automatically became wards of the court upon their mother's death. Stanley at 646. Here, Child automatically became a ward of whoever claimed his custody upon Mother's abandonment.

Third, in both cases the children's father's actual fitness was irrelevant to the court's custody decision. In essence, an unwed father is presumed unfit to raise his child or children. Stanley at 647. Is this an undue burden? "It would be his burden to establish not

only that he would be a suitable parent, *but also that he would be the most suitable of all who might want custody of the children*." Stanley at 648 (italics mine).

There is a great legal difference between a parent with custody and a non-parent with custody: "* * * legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such cause as must be shown in a neglect proceeding against a parent." Stanley at 648-9 (italics mine). Stanley goes on to explain at 651-2:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).
>
> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and

> nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, *supra*, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). 'To say that the test of equal protection should be the "legal," rather than the biological, relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.' Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968).
>
> "These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."

One more thing Peter Stanley and I have in common: "* * * nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children" Stanley at 655. Therefore: "We

think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. " Stanley at 657-8.

RELEVANT PARALLELS WITH SMITH

The main point of Smith v. O.F.F.E.R. applied here would be the difference between parents and non-parents when it comes to constitutionally-protected rights. To put it succinctly, the relationship between parents and children is protected by the Constitution (Smith at 842, 845, citations and footnotes omitted):

> "It is, of course, true that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' * * * There does exist a 'private realm of family life which the state cannot enter,' * * * that has been afforded both substantive and procedural protection. * * * * * The individual's freedom to marry and reproduce is 'older than the Bill of Rights,' * * *. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment * * *, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' "

But, the relationship between non-parents and children is not (Smith at 846-847, citations and footnotes omitted, italics added):

> "*A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another.* Here, however, such a tension is virtually unavoidable. * * * It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right."

RELEVANT PARALLELS WITH MICHAEL H.

Just as the actual father in Michael H. v. Gerald D. was found to have no enforceable rights to his child largely on the basis of being an interloper into a marital relationship, it's high time this court put the brakes on the efforts of those who violate natural law by manufacturing parents through giving recognition to squatters and interlopers. This cannot be allowed to stand. Michael H. v. Gerald D., *supra,* at 128-9, provides:

> "In Lehr v. Robertson, a case involving a natural father's attempt to block his child's adoption by the unwed mother's new husband, we observed that '[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,' 463 U.S. at 262, and we assumed that the Constitution might require some protection

of that opportunity, *id.* at 262-265."

Justice Scalia's lead opinion mentioned "[a]t the outset, it is necessary to clarify what he sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood." Michael H. at 118. Unlike the fathers later mentioned in that case who created "[c]onfusion, uncertainty, and embarrassment to the child"[2] by pressing for visitation rights, I have lived with my child, I've changed my share of diapers, I have constantly supported him and maintained our relationship as best as could be expected under the circumstances of my duty to my country.

Another important point made in Michael H. applies very much here: "* * * whatever the merits of the guardian *ad litem's* belief that such an arrangement [both "fathers"] can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country." Michael H. at 130-1 (italics original). In the case introduced by this Petition, the opinions of two guardian ad litems

---

[2] Michael H. at 134, Stevens concurring.

and a psychologist were introduced as evidence to establish Respondent's "fatherhood" in Child's life. Respondent should be the visitor, not me!

THE "POWERFUL COUNTERVAILING INTEREST" STANDARD

It is settled constitutional law that, when both a parent and a non-parent seek custody of a minor child the trial court must apply the "powerful countervailing interest" standard of Stanley v. Illinois, *supra*. The parent's constitutionally-protected priority right to custody simply cannot be abridged absent that "powerful countervailing interest." In a non-parental custody action brought under RCW 26.10, the non-parent must establish that the parent is unfit *or* that under the circumstances the child's growth and development would be "detrimentally affected" by placement with an otherwise fit parent. In this case, the state courts *erroneously* applied the lower "best interest of the child standard" and granted custody to the non-parent Respondent, even though there was no showing of any "powerful countervailing interest" sufficient to overcome Father's constitutionally-guaranteed right to custody.

DEFERENCE DUE VETERANS

The Soldiers' and Sailors' Civil Relief Act protects active-duty military personnel from suits such as this. However, can my military career — or one's patriotism in general — actually be allowed as a penalty against me when claiming my own child from a non-parent?? Should there be a disclaimer at every armed forces induction center warning all parents or potential parents they could lose their rights to their children because of service to their country?? This bears scrutiny by this process brought to you now.

CONCLUSION

Back to the questions presented by this Petition:

First, does a person found by the court to have "psychological parent" status have substantive rights sufficient to overcome a fit parent's rights, privileges and liberties guaranteed by §1 of the Fourteenth Amendment? Your relevant decisions say *no*.

Second, is a person's active duty in the United States military a legal disability in determining custody of his or her child? This remains to be answered through the process of this writ. According to Washington state courts in my case — thank god it is an

unpublished opinion — it is.

Third, how well-defined must "harm" be in a state statute which is relied upon to award custody of a child to a non-parent against a fit parent? This remains to be answered through the process of this writ.

Your Honors, I am not a lawyer and I don't pretend to be. Lawyers got this case so messed up it has to come to you. But there *must* come a time when the legitimate assertion of parental rights triumphs. Creating parental status out of whole cloth is a fraud perpetuated on American families by the legal, mental health and social services industries. This is just sophistry. I am not denying Washington state its inherent right to exercise *parens patriae* in appropriate cases. This is not one.

Please reverse Washington's mistake in this case.

Respectfully submitted June 21, 1999

Eugene P. Dittler, Petitioner *pro se*

APPENDIX

- Order denying review by the Washington State Supreme Court, dated March 22, 1999.
- In re the Custody of Charles Dittler, unpublished opinion by the Washington State Court of Appeals, Division I, on January 25, 1999, case number 40658-2-I.

BEST AVAILA

C. J. MERRITT
SUPREME COURT CLERK

RONALD R. CARPENTER
DEPUTY CLERK/CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.go

March 22, 1999

Honorable Norm Maleng
King County Prosecutor
Mr. Joshua Foreman, Deputy
Ms. Martha Zwicker, Deputy
1850 Key Tower
700 5th Avenue – Appellate Unit
Seattle, WA 98104

Mr. H. Michael Fields
Attorney at Law
207 E. Edgar Street
Seattle, WA 98102

Mr. Eugene Dittler
1500 NE 15th Avenue, #440
Portland, OR 97232

Ms. Catherine Smith
Attorney at Law
701 5th Avenue, Suite 7170
Seattle, WA 98104

Honorable Richard Johnson, Crt. Admin./Clerk
Division I, Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101

Re: Court of Appeals No. 40658-2-I – Eugene Dittler v. Philip Robey

Clerk, Counsel & Mr. Dittler:

This will acknowledge receipt on March 22, 1999, of Mr. Dittler's pleading entitled: "MOTION TO MODIFY RULING AND PETITION FOR REVIEW UNDER RAP 17.7 AND REQUEST FOR AN EXTENSION OF TIME TO FILE THIS MATTER HEREIN".

A review of the Court of Appeals record (as contained on the ACORDS computer system) indicates that on March 5, 1999, the Court of Appeals issued its mandate. As such the above referenced pleading is not subject to review by this Court at this time, see RAP 12.7(b). Accordingly, the pleading has been rejected for filing and placed in our unfiled papers section.

Sincerely,

Ronald R. Carpenter
Supreme Court Deputy Clerk

RRC:crf

BLE COPY

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION I
DATE JAN 25 1999
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Custody of:	
[E.A.R.] and [C.D.],	No. 40658-2-I
Minor Children.	DIVISION ONE
PHILIP ROBEY,	
Respondent,	UNPUBLISHED OPINION
	FILED: JAN 25 1999
and	
LORI RUST, Mother,	
and	
EUGENE DITTLER, Father [of C.D.],	
Appellant.	

GROSSE, J. – When both a parent and a nonparent seek custody of a child, the natural or biological parent's constitutionally protected priority right to custody may not be abridged absent a powerful countervailing interest. A nonparent seeking custody must establish either that the biological parent is unfit or that under the circumstances the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. Here, the trial court determined that the best interests of the child would be served by placement with the nonparent because the child's growth and

development would be detrimentally affected by placement with his biological father. That decision is supported by the record. Accordingly, we affirm.

This is an appeal from a custody decree under RCW 26.10 in which the trial court ordered the retention of 7-year-old C.'s placement with a nonparent. C. was born in 1990 to unmarried parents Lori Rust and Eugene Dittler. Dittler was in the United States military and shortly after the birth was stationed away from Rust and the child until his discharge in 1996. He paid child support and visited his son at least once a year during that period.

In the meantime, Rust began a relationship with Philip Robey. They became parents of a child E., who is C.'s half-sister. Robey purchased a home that he, Rust, and the children moved into in September of 1993, and where the children continue to live with Robey. Unfortunately, Rust became involved in unseemly activities and suffered from mental problems manifested by suicide attempts. In 1995, Robey filed a parentage action seeking custody of his own child and a nonparental custody action seeking custody of C. as well. Rust quickly settled with Robey, but Dittler contested the custody of his son.

The trial court set forth the issue of the case as whether it would be in the "best interests of the child" to grant the nonparental petition for custody of C. to Robey or to place him in the custody of his biological father. The trial court awarded primary custody to Robey based on C.'s risk of attachment disorder due to the separation from his mother experienced as abandonment, C.'s emotional fragility, potential genetic

psychological problems due to his biological father's diagnosis of bipolar disorder, the fact that C. is integrated into the family unit of Robey and his half-sister, and most importantly because C.'s growth and development would be detrimentally affected were the court to place him with his biological father. However, the trial court also recognized the rights of the biological father and the yearning that every child eventually has to know his biological parent. The court set forth that, except for his physical absence from C.'s life for almost six years, there was no other evidence that Dittler would be unfit to parent C. The court ordered that a parenting plan be established providing for regular visitation, working up to liberal visitation provided the relationship between C. and Dittler is maintained. Proposed findings of fact and conclusions of law were prepared, but a final order was not entered until February 18, 1998 which incorporated the trial court's memorandum decision.

Dittler argues the trial court erred in using only the "best interests of the child" standard, and that custody should be awarded to him as a matter of law. Although it may appear the trial court only looked to the best interests standard by stating that the issue was whether it was in the best interest of C. to grant the petition or place him in the custody of his biological father, a review of the court's memorandum decision establishes that the court went beyond this inquiry and recognized the correct "powerful countervailing interest" standard in its determination. That decision is supported by the evidence before it.

Here, the trial court did not find Dittler unfit in the usual sense, but nonetheless awarded custody to a nonparent. Where circumstances such as those presented in this case indicate that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent, parental rights may be outweighed.[1] The record supports the court's findings as listed above, and as such we affirm the decision of the trial court.

Finding that the appeal is neither frivolous nor a violation of RAP 18.9, we award no attorney fees on appeal.

Grosse, J

WE CONCUR:

Agid, ACJ

Becker, J.

[1] In re Marriage of Allen, 28 Wn. App. 637, 647, 626 P.2d 16 (1981).